Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187

REPLY COMMENTS OF U S WEST, INC.

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October 24, 1996

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SUMMARY

U S WEST, Inc. ("U S WEST") hereby responds to comments filed in the above-captioned proceeding relating to Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 ("1996 Act"). In the Notice, the Federal Communications Commission ("Commission") has proposed several measures to implement the Section 402(b)(1)(A)(iii) streamlined local exchange carrier ("LEC") tariff review process. U S WEST supported some of those proposals as consistent with the language of the 1996 Act and with the intent of Congress to reduce regulation and encourage introduction of new services. In this reply, U S WEST discusses comments contrary to that intent.

First, "deemed lawful" means that tariffs are lawful until proven otherwise, and retroactive damages based on a finding of unlawfulness cannot be awarded. Second, the language of Section 402(b)(1)(A)(iii) does not preclude new service tariffs from being processed under streamlined procedures. The 1996 Act's legislative intent and history confirm that conclusion. Third, Section 402(b)(1)(A)(iii) does not provide for any deferral of streamlined tariffs. Fourth, the statute insists on reduced regulation, not increased regulatory burdens as some commenters suggest. Finally, U S WEST's reply comments note the overwhelming support for institution of an electronic tariff filing process and emphasize the fact that the Commission is obligated under the statute to conclude tariff investigations within five months.

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REPLY COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby replies to comments[1] on the Federal Communications Commission's ("Commission") implementation of proposals relating to Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996,[2] which provides for streamlined tariff filings by local exchange carriers ("LEC").[3]

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[1] Commenters referenced herein include: Ameritech; AT&T Corp. ("AT&T"); Bell Atlantic Telephone Companies ("Bell Atlantic"); BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth"); Cincinnati Bell Telephone Company ("Cincinnati Bell"); Frontier Corporation ("Frontier"); General Services Administration ("GSA"); GTE Service Corporation and its affiliated domestic telephone operating companies ("GTE"); MCI Telecommunications Corporation ("MCI"); MFS Communications Company, Inc. ("MFS"); The NYNEX Telephone Companies ("NYNEX"); Pacific Telesis Group ("PacTel"); Sprint Corporation ("Sprint"); United States Telephone Association ("USTA"); U S WEST.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[3] In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, Notice of Proposed Rulemaking, FCC 96-367, rel. Sep. 6, 1996 ("Notice").

I. IN DETERMINING THAT LEC TARIFFS MUST BE DEEMED LAWFUL, CONGRESS MEANT PRECISELY WHAT IT SAID (Notice ¶¶ 7-13)

As pointed out in U S WEST's initial comments, the new statutory requirement that any new or revised charge, classification or practice filed by a LEC shall be "deemed lawful" must be read as effectuating some Congressional purpose.[4] In the context of the pre-1996 Act statutory structure, this purpose can be met only if filed tariffs cannot be the subject of retroactive Communications Act damage awards -- especially reparations.[5] Such a statutory interpretation is consistent with other Congressional dictates limiting the ability to collect from carriers reparations based on past charges levied pursuant to tariff.[6] This conclusion was set forth for comment as one of two alternatives in the Notice itself and is clearly correct. Any other interpretation of the statutory language would simply deprive it of meaning, something the Commission has neither the authority nor the inclination to do.

In suggesting that the "deemed lawful" language in the statute cannot lead to this deregulatory conclusion, various commenters assert generally that actually deeming a filed and effective carrier rate to be lawful would be such a radical change that Congress could not have possibly intended such a result. AT&T

[4] U S WEST at 1-2.

[5] Id. at 3-4.

[6] Id. at 4-5.

contends that this interpretation would "work[ ] a radical change in the law that has long governed tariffing by permitting [incumbent] LEC monopolists to collect, without liability from damages, any rate that they file, no matter how unjust or unreasonable, unless the Commission suspends that rate within either 7 or 15 days."[7] AT&T relies heavily on the absence of legislative history on the statutory language, arguing that giving effect to the plain language of the 1996 Act would require a presumption "that Congress rewrote more than a century of settled law by inference, via an amendment to a subsection of the Communications Act of 1934 addressing not damages awards, but the Commission's power to suspend tariff filings."[8] Frontier takes a similar tack, contending that any interpretation of the statutory language beyond a mere shift in the presumptions which must be overcome by a petitioner seeking suspension would "permit exchange carriers to file tariffs that are blatantly unlawful, subject only to a later finding of unlawfulness that would afford prospective relief only."[9] The short response to these contentions is that the statutory language is binding and dispositive, no matter how much a different statutory provision might be desired by the commenting parties.[10] In fact, blatantly unlawful tariffs would, of course, be rejected or suspended prior to the effective date based on a petitioner's comments or the Commission's own initiative.

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[7] AT&T at 4.

[8] Id. at 6. See also GSA at 4-5.

[9] Frontier at 2.

[10] See Chevron, U.S.A. v. Natural Resources Defense, 467 U.S. 834, 843, reh'g denied, 468 U.S. 1227 (1984); MCI Telecommunications v. American Tel. & Tel., 114 S. Ct. 2223 (1994).

The suggestion made by these commenters that the "deemed lawful" language simply shifts on a statutory basis the pre-suspension presumptions in a tariff filing[11] would render the "deemed lawful" language meaningless, as any such shifting, at least without giving the affected LECs a right to challenge an adverse tariff suspension decision in court, would not modify the actual statute one iota. The Commission has always had complete and unreviewable discretion in suspending a tariff.[12] An interpretation that the "deemed lawful" language in the 1996 Act merely grants the Commission more discretion than total discretion would simply ignore the reality that Congress obviously intended to accomplish something via this statutory provision; such an interpretation would also act directly counter to Congressional intent.

MCI's comments, while reaching the opposite conclusion, recognize this fundamental reality. MCI concludes that an interpretation of the 1996 Act which actually gave meaning to the "deemed lawful" language of the 1996 Act might result in judicial review of Commission suspension decisions, contrary to settled precedent to the effect that suspension decisions are not reviewable.[13] This conclusion is premised on the fact that one of the reasons courts had not reviewed tariff suspension orders in the past is that tariffs in the past had not been deemed lawful under the statute. Because the Administrative Procedure Act requires that the

[11] See, e.g., Frontier at 2-3; AT&T at 4-6.

[12] U S WEST at 6.

[13] MCI at 6-9.

agency explain its decisions, and because orders denying tariff suspensions customarily do not contain an explanation, MCI concludes that Congress would never have wanted the Commission to explain its suspension decisions at a level sufficient to survive judicial review.[14] Accordingly, MCI argues that Congress did not intend that the "deemed lawful" language in the 1996 Act actually mean what it says because such an interpretation would require judicial review and, concomitantly, agency explanation.

MCI raises a good point, but not one which actually leads to the conclusion it desires. It is certainly true that some of the factors which went into the judicial decisions of the past to the effect that tariff suspension decisions were not reviewable have been modified by the "deemed lawful" language of the 1996 Act. Courts will undoubtedly need to wrestle with the question of whether, under the 1996 Act, suspension decisions are in fact reviewable (we assume not, but neither U S WEST nor the Commission determines the extent of the appellate jurisdiction of United States Courts of Appeals). The cases relied on by MCI seem to dispute MCI's own conclusion, observing that in a tariff review situation judicial review is not mandated even if the complaining party may not be able to correct "the full overcharge that would have been available had the Commission ordered an investigation."[15] The fact that MCI might be "harmed" by having to pay a rate

[14] Id. at 8-9, citing Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 456, reh'g denied, 444 U.S. 890 (1979) ("Southern Railway").

[15] Aeronautical Radio, Inc. v. FCC, 642 F.2d. 1221, 1235, n.34 (D.C. Cir. 1980), cert. denied, 451 U.S. 920, 976 (1981) ("Aeronautical Radio").

ultimately deemed too high has not been accepted as a basis for judicial review of tariff decisions in the past.

But the scope of appellate review is not a factor which legitimately enters into the regulatory decisions of this Commission. The law is very clear -- LEC tariff filings are "deemed lawful." This statutory language, as the Notice properly recognizes, works radical changes on a number of old assumptions existing under the old Communications Act of 1934, as amended. The new language (and, indeed, the 1996 Act as a whole) will also no doubt be read as requiring the reexamination of assumptions (and decisions) which have been made by appellate courts. MCI's analysis is in essence an invitation to the Commission to interpret the 1996 Act in a manner which minimizes the possibility of judicial review. This Commission should reject this invitation.

One of the interesting aspects of MCI's comments is its reliance on two court decisions which stand for the straightforward proposition that reparations for an unreasonable rate are not a part (certainly not an important part) of the Communications Act. In Southern Railway, cited repeatedly by MCI, the Supreme Court held that, in a proceeding under the Interstate Commerce Act (the predecessor to the Communications Act), a party complaining about an unreasonably high rate already in effect would be "limited . . . to actual damages rather than the full refund of overcharges available under [the ICC's refund provisions]."[16] This same principle was applied to the Commission in Aeronautical

[16] Southern Railway at 454-55.

Radio, wherein it was observed that a complaining party challenging an effective tariff may need to "restrict his ultimate relief to actual damages rather than to the full overcharge that would have been available had the FCC ordered an investigation."[17] In both of these cases the courts accepted as unexceptional the proposition which AT&T finds so startling as to require a rewrite of the language of the 1996 Act: that there may be circumstances where parties challenging a rate ultimately determined to be too high will not have a refund remedy available. Given competitive reality, the actual filings of excessive rates by LECs will no doubt be comparatively rare. But as MCI's own cases expressly recognize, the possibility that such could happen is not a legitimate reason for ignoring the plain language of the 1996 Act.

In short, the "deemed lawful" language of the 1996 Act requires that LEC tariffs be deemed lawful until proven otherwise, and that retroactive damages based on a Commission finding of an unreasonable rate level must be denied.

II. ELIGIBILITY AND ADMINISTRATION ISSUES (Notice ¶¶ 18-33)

A. Application Of Section 204(a) (Notice ¶ 18)

In its comments, U S WEST argued that new service tariffs should be reviewed under streamlined procedures and that the language of Section

[17] Aeronautical Radio at 1235, n.34.

402(b)(1)(A)(iii) corroborates that conclusion.[18] If there is any ambiguity as to whether Section 402(b)(1)(A)(iii) permits streamlined treatment of new service tariffs (U S WEST submits that there is not), the intent of Congress in enacting the 1996 Act confirms that the interpretations of U S WEST and many other commenters are correct.[19]

Several commenters, who claim to support the intent of the 1996 Act, object to such treatment.[20] It appears that they have ignored the 1996 Act's preamble which summarizes the entire purpose of the 1996 Act:

> To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and *encourage the rapid deployment of new telecommunications technologies.*[21]

The statute's legislative history is replete with references that correlate the rapid provision of new innovative services with reduced regulation.[22] Moreover, the

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[18] U S WEST at 9-11. See Ameritech at 10; Bell Atlantic at 2; USTA at 4-5; PacTel at 10, BellSouth at 8. Other commenters additionally and importantly point out that Section 402(b)(1)(A)(iii) of the 1996 Act utilizes the same language as that used in Section 204(a)(1) of the Communications Act of 1934, which has long been held to apply to new services. See GTE at 17; NYNEX at 13.

[19] Bell Atlantic at 2; GTE at 16; PacTel at 10.

[20] AT&T at 9; MCI at 15; MFS at 2-3; Frontier at 3.

[21] 1996 Act, 110 Stat. at 56 (emphasis added).

[22] See, e.g., Conference Report on S.652 at 1 (Report 104-458) ("to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services. . . ."); Senate Report on S.652 at 9 (Report No. 104-230) ("reducing regulation of the telecommunications industry will spur the development of new technologies. . . ."); House Report on H.R. 1555 at 47 (Report No. 104-204) [Purpose and Summary] ("[the legislation] promotes competition and reduces regulation in order to . . . encourage the rapid development of new telecommunications technologies.").

Commission itself recognizes that a correlation exists between streamlined filings and the prompt introduction of new tariff offerings.[23] The language of Section 402(b)(1)(A)(iii) and Congress' intent clearly compel the Commission here to permit the processing of new LEC service tariffs under streamlined procedures.

B. Deferral (Notice ¶ 6)

In its comments, U S WEST supported the Commission's conclusion that Congress did not intend for the Commission to defer tariffs subject to streamlined filing.[24] Section 402(b)(1)(A)(iii) makes no reference to a 120-day deferral, or to Section 203(b)(2), the provision in the Communications Act of 1934 which allows a 120-day deferral. Several commenters agreed with this position.[25]

Even MCI agrees that Section 402(b)(1)(A)(iii) precludes deferral of tariffs subject to streamlined filing.[26] Similarly, Sprint states that "[t]o interpret this section otherwise would eviscerate the shortened notice provisions of Section 204(a)(3) and thwart the plain intent of Congress to speed up the effective date of certain LEC tariffs."[27] The Commission should observe its initial conclusion that it

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[23] See In the Matter of Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, 9 FCC Rcd. 1687, 1702 ¶¶ 79-82 (1994); and see In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order, 8 FCC Rcd. 6752 (1993).

[24] U S WEST at 17.

[25] Cincinnati Bell at 4; GTE at 7; NYNEX at 8; Ameritech at 5.

[26] MCI at 2. U S WEST recognizes that MCI and U S WEST disagree as to which LEC filings are eligible for streamlined processing.

[27] Sprint at 2.

has no authority to defer streamlined tariffs 120 days, and reject those comments which argue against reduced regulation.

C. Tariff Filing and Petition Cycles (Notice ¶ 28)

U S WEST agreed with the Commission that objections to seven-day streamlined tariffs must be filed within three days of the tariff filing date and replies must be filed two days thereafter.[28] With respect to new services, for which U S WEST has proposed a 15-day effective period, U S WEST proposed a six-day petition and a four-day reply cycle.[29] In contrast, several commenters proposed additional unreasonable LEC filing hurdles.

For example, MCI argued that LECs should be required to send seven-day advance notice via facsimile of the filing of a streamlined tariff.[30] MFS provided the most preposterous proposal, that the Commission adopt a requirement that LECs make publicly available a schedule of planned streamlined filings at least 30 days prior to the date of filing.[31] Clearly, these proposals fly in the face not only of efforts to streamline the tariff review process, but also of the 1996 Act.

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[28] Any shorter reply deadline would be virtually impossible (and extremely unfair) to meet. Contra AT&T at 15 ("AT&T urges that the Commission instead allow *3 business* days for filing petitions, and *1 calendar* day for replies. . . .")(emphasis added).

[29] U S WEST at 19.

[30] MCI at 21.

[31] MFS at 10.

These proposals would serve only to impose additional and more oppressive regulation upon LEC introduction of new services and are clearly at odds with the language and intent of the 1996 Act. The Commission must reject each outright.

D. Electronic Filing (Notice ¶ 28)

All but one commenter enthusiastically endorsed electronic filing of tariffs and related pleadings.[32] While Sprint appears to back the general idea, it is hesitant to support fully the proposal because it feels that the "industry is not in a position to adopt rules at this time."[33] Sprint's reluctance should not deter the Commission from promulgating rules to institute electronic tariff filing. Such a filing process is consistent with streamlined filing goals. Commenting parties, including U S WEST, proposed sound options that could be adopted by the Commission (and which should allay Sprint's fears).[34]

Notwithstanding the adoption of an electronic tariff filing system, the Commission should maintain its current filing deadline of 5:30 p.m. eastern standard/daylight savings time.[35] MFS suggests modifying this customary deadline solely for LEC tariff and tariff-related filings.[36] Such a change serves no purpose

[32] See, e.g., U S WEST at 12-14; AT&T at 13; USTA at 8-9. But see Sprint at 5.

[33] Sprint at 5.

[34] See, e.g., U S WEST at 12-14; USTA at 8-9; BellSouth at 8-11.

[35] Given the short petition/reply cycle, the Commission should post tariff filings on its website on the same day they are received.

[36] MFS at 11.

and only adds another anomaly to the myriad Commission filing rules currently in place.

E. Investigation Rules (Notice ¶ 33)

U S WEST did not propose any procedural rules relating to Commission investigation of tariffs because the varying complexity of tariffs requires that the Commission be provided with flexibility to structure such investigations.[37] We note, however, that regardless of the procedural flexibility U S WEST and other parties support, the Commission has no flexibility with respect to concluding such investigations. Section 204(a) allows the Commission to "suspend the operation of [a tariff], in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect. . . ."[38] That is, a final order must be issued at the end of that period. Several commenters, LECs and new entrants alike, emphasized this point as well (whether or not they agree with the need to promulgate procedural rules relating to tariff investigations).[39] The Commission must strictly observe this congressional mandate.

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[37] See BellSouth at 18; PacTel at 25; MCI at 28; AT&T at 19.

[38] 47 USC § 204(a).

[39] BellSouth at 18; NYNEX at 26; PacTel at 25; Bell Atlantic at 9; MCI at 28; AT&T at 19; Frontier at 7. U S WEST strongly disagrees with Frontier's bifurcated approach under which investigations into the lawfulness of a tariff would be decided within five months, but the Commission would be provided up to a year to determine damages. The language in the statute clearly allows only five months to complete the entire tariff investigation (including determination of any damage awards).

F. Part 69/Special Permission

Finally, consistent with streamlined regulation goals, U S WEST urges the Commission to address the Part 69 waiver process. In addition, U S WEST supports GTE's comments regarding revision of the Part 61 special permission processes.[40] Such steps would be consistent with the deregulatory intent of the 1996 Act.

III. CONCLUSION

U S WEST respectfully requests that the Commission adopt rules implementing Section 402(b)(1)(A) of the 1996 Act consistent with the comments and reply comments U S WEST filed in this proceeding.

Respectfully submitted,

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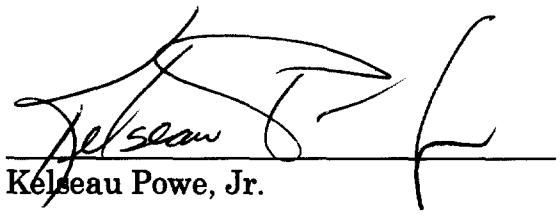
[40] GTE at 24.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 24th day of October, 1996, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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